

Supreme Court, U. S.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1975

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No.      76-124

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MANUEL FEDERICO MADRID,

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE  
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FOR THE FIFTH CIRCUIT

The Petitioner, Manuel Federico Madrid,  
prays that a Writ of Certiorari issue to  
review the judgment of the United States  
Court of Appeals for the Fifth Circuit,  
entered in the office of the clerk of  
that court on May 24, 1976.

### OPINIONS BELOW

On March 28, 1975, the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit was affirmed and is reported at 510 F.2d 937.

On Petition for Rehearing it was remanded for an evidentiary hearing on the lawfulness of the stop and search of Petitioner's vehicle which is reported at 517 F.2d 937.

The Petitioner's appeal from the findings of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on May 24, 1976. The opinion is unreported and appears as Appendix A.

### JURISDICTION

On May 24, 1976, the United States Court of Appeals for the Fifth Circuit

affirmed the findings of the District Court. The Petition for Rehearing was timely filed and was denied on June 28, 1976. This petition for certiorari was filed less than 30 days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

### QUESTION PRESENTED

Whether the stop of the Petitioner by Border Patrol agents at a checkpoint that was not reasonably located and was not a permanent checkpoint is consistent with the rights guaranteed to Petitioner under the Fourth Amendment.

### CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against reasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 8, United States Code, §1324 (a)

(2) Title 8, United States Code, §1325.

#### STATEMENT of the CASE

The Petitioner was convicted in the United States District Court for the Western District of Texas on two counts of transporting illegal aliens in violation of Title 8, United States Code, §1324 (a) (2). He was sentenced to confinement for five years on each count, the sentences to run concurrently. Petitioner had previously been convicted of violating Title 8, United States Code, §1325 and had been placed on probation for that violation. The

District Court used the evidence presented at the trial to revoke the probated sentence. The appeal of Petitioner's conviction and the appeal of the revocation of probation were consolidated for the purposes of his appeal to the United States Court of Appeals for the Fifth Circuit. The decision of the District Court was affirmed, but the Petition for Rehearing was granted and the case was reversed for the sole purpose of remanding to the District Court for an evidentiary hearing on the lawfulness of the stop and search of Petitioner's vehicle.

At the evidentiary hearing the District Court found that the checkpoint was fixed and permanent and that it was a reasonable distance from the border on a main traveled highway directly leading from the border. Based on these findings,



the District Court further found that the stop and search of the Petitioners vehicle was lawful and valid. This finding was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed. Petition for Rehearing was denied on June 28, 1976.

#### STATEMENT OF FACTS

On January 19, 1974, two United States Border Patrolmen were manning a checkpoint in New Mexico on Highway 70-82 at a point approximately 1.8 miles east of the White Sands Missile Range exit for the purpose of determining the citizenship of people passing through the checkpoint.

The main highway leaving El Paso, Texas, near the Mexican border area is Interstate 10 which leads to Las Cruces, New Mexico, approximately forty miles away, where it connects with Interstate 25. At that point

Interstate 10 branches west to Deming, New Mexico, and Interstate 25 leads north to Albuquerque, New Mexico. At Las Cruces, several miles north of the Interstate 10-Interstate 25 intersection, Highway 70-82 intersects Interstate 25 in a generally east and northeasterly direction toward Alamogordo, New Mexico. The location of the checkpoint was approximately 22.2 miles east of the point where Highway 70-82 intersects Interstate 25. See Appendix B.

The area between Las Cruces and the checkpoint is sparsely populated desert area with several mobile home parks and a small town with a population of about 2,000.

The checkpoint was set up to check eastbound traffic which could be travelers that had been moving north on Interstate 25 and turned right or had been

traveling south on Interstate 25 from the direction of Albuquerque, and had turned left onto Highway 70-82. Vehicles could also reach the point by traveling directly from Las Cruces or from one of the mobile home parks or the little town between Las Cruces and the checkpoint. Also, people leaving White Sands Missile Range and traveling east for more than 1.8 miles would be subject to the checkpoint procedure.

Traffic going through the checkpoint consisted of trucks and other commercial vehicles, military vehicles, missile range personnel, and vacationers. Every vehicle that reached the checkpoint was stopped. The Border Patrol Officers' at the checkpoint had no reason to believe that any of the vehicles that they stopped on January 19, 1974, had been at or near the border.

Travelers were warned that they would be required to stop by permanent signs which read "Caution, roadblock one mile ahead", "Caution, roadblock one-half mile ahead" and "Caution, roadblock 300 feet ahead". The checkpoint itself was an asphalt surfaced area at the side of the road that was about 300 feet long and 40 feet wide with rest room facilities, a small utility building and two light poles. At the point where vehicles were stopped was a sign that read "Military stop, roadblock".

All of the facilities that were being used by the Border Patrol as a checkpoint on January 19, 1974, were originally erected and were still maintained by the Army to hold traffic during missile firings. Whenever the Army needed to hold traffic, the point would be relinquished by the Border Patrol, if it was

using the point at that time.

There were no fixed hours of operation of the checkpoint by the Border Patrol. The hours of operation were determined by the manpower available. When the manpower was available, the point was supposed to be manned for one eight hour shift each day. But it was not even manned the full eight hours because it would take an hour or more for the officers to drive from Las Cruces and set up the checkpoint by opening the warning signs and setting out portable signs. It was abandoned in May of 1974.

The point was between 46 and 46-1/2 air miles from the international boundary.

On January 19, 1974, Petitioner's vehicle was stopped at the checkpoint and a Border Patrol officer asked him to state his citizenship to which he responded, "American citizen". In the same

vehicle were two women and a baby. It was later determined that the women were illegal aliens.

The only reason that Petitioner's vehicle was stopped was because all east-bound vehicles were being stopped. The officers had no reason to believe that Petitioner had crossed or been at or near the border. They had no reason to believe that he had been in contact with anyone who had been at or near the border. They had no reason to believe that he had committed any offense.

#### REASONS FOR GRANTING THE WRIT

This Court has recognized that there are three types of checking operations used by the Border Patrol in an effort to minimize illegal immigration; permanent checkpoints, temporary checkpoints and roving patrols. United States v. Martinez-Fuerte 74-1560 (Slip Opinion)



holds that the Border Patrol routine of stopping of a vehicle at a permanent checkpoint on a major highway away from the Mexican border for brief questioning of the vehicles occupants is consistent with the Fourth Amendment, and the stops may be made at reasonably located checkpoints in the absence of any individualized suspicion that the particular checkpoint contains illegal aliens.

Petitioner was stopped at a checkpoint that did not have the characteristics of a permanent checkpoint as outlined in the Martinez-Fuerte case, it was not on a major highway away from the border, and it was not reasonably located. This Court has not ruled on the legality of stops of the nature of the one in which Petitioner was involved.

#### ARGUMENT

The Border Patrol's stopping of the

Petitioner's vehicle was not made at a permanent checkpoint reasonably located on a major highway away from the Mexican border.

The evidence is uncontradicted that the facilities being used by the Border Patrol at the time of the stop were owned and maintained by the U.S. Army and the only notice to the public as to the purpose of the stop was the sign that said "Military stop, roadblock". This is very different from the San Clemente checkpoint that is the subject of United States v. Martinez-Fuerte, supra. At San Clemente there was a permanent building to house the Border Patrol office and temporary facilities. At the point where Petitioner was stopped, the Border Patrol had no permanent structures of its own and the Army had only restroom facilities and a small utility



building. The warning signs were erected by the Army for purposes of advising travelers when they would be stopped to protect them from dangers that they might be subjected to at times of missile firings. The sign that read "Military stop, roadblock" would certainly not indicate to anyone that his citizenship would be questioned when he stopped.

There was no visible manifestation of the Border Patrol officer's authority at the checkpoint to question the citizenship of the persons stopped. In justifying checkpoint stops at San Clemente this Court has stated in United States v. Martinez-Fuerte (Slip Opinion p.15) that the regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve

the public interest. But there is nothing reassuring to a person who is stopped for what appears to be one valid purpose and he then suddenly finds that he was stopped for an altogether different reason.

The checkpoint at San Clemente was in operation about 70% of the time which is one of the characteristics which establishes its permanent nature. The checkpoint where Petitioner was stopped was in operation less than eight hours a day on the days that it was manned, but it was only manned when personnel was available. There was no real regularity in terms of time of operation of this checkpoint that would allow it to be characterized as "permanent". Further, the checkpoint has not been manned since May of 1974.

In summary, the Border Patrol neither

owned or maintained any of the facilities at the checkpoint location which it used to use on an irregular basis at the whim of the Army and there was nothing at the location to advise the public that it was a Border Patrol checkpoint or that the stop was being made to check for illegal aliens. All of the standards upon which this Court has justified stops at the San Clemente checkpoint are absent in this case, and the decision of the United States Court of Appeals for the Fifth Circuit holding this stop legal has the effect of denying the Petitioner his Fourth Amendment protection against law enforcement officers who made a standardless seizure of his person.

In addition to the requirement of permanency, this Court held in United States v. Martinez-Fuerte, supra, that

for the stop to be justified, it must be made at a reasonably located checkpoint on a major highway away from the border.

It is clear that Petitioner was not stopped at or near the border. The location of the stop was between 46 and 46 1/2 air miles from the international boundary. The question then becomes, was the stop made at a reasonably located checkpoint on a major highway away from the border. All of the evidence establishes that it was not. The checkpoint was on Highway 70-82 which connects Las Cruces and Alamogordo, New Mexico. To reach the point one starting at the border at El Paso, Texas, traveling by major highway would take Interstate 10 some 40 miles to Las Cruces, then change to Interstate 25 and travel on it until it intersects with Highway 70-82 where it would then be necessary to turn right

and travel 22.2 miles to the checkpoint. Highway 70-82 is not a major highway leading away from the border.

The traffic going through the checkpoint consisted of trucks and other commercial vehicles, military vehicles, missile range personnel and vacationers. The Border Patrol officers had no reason to believe that any of the vehicles or their occupants had been at or near the border, and there is no evidence to show that they had any reason to so believe.

Unless the Border Patrol has some reason to believe that it will intercept illegal aliens at the checkpoint, then it cannot be said that the checkpoint is reasonably located. The number of illegal aliens apprehended at the San Clemente checkpoint is some evidence that it is reasonably located, but there is no evidence of this nature or any other

nature to establish the reasonableness of the location in the present case.

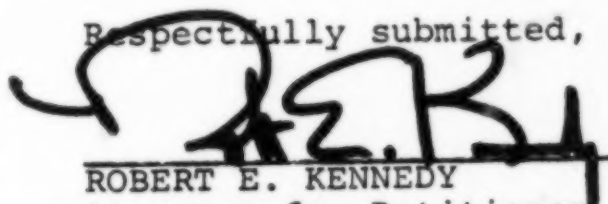
This checkpoint was not reasonably located as required by the standards set out in United States v. Martinez-Fuerte. It was not at the functional equivalent of the border as defined in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). There was no reasonable suspicion on the part of the Border Patrol agents that Petitioner had committed an offense which would justify the stop as required under United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In that this checkpoint does not meet the standards of a permanent checkpoint as set out in United States v. Martinez-Fuerte, anything less than full compliance with those standards will not justify a checkpoint stop which is the equivalent of the seizure of a person, and involves

essentially the same type of intrusion upon the person that is occasioned by roving patrol stops without reasonable suspicion. United States v. Brignoni-Ponce, supra.

#### CONCLUSION

As a result of the opinion below, the Fourth Amendment rights of the Petitioner have been denied to him. For this reason and for the reasons set out above, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

  
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#### APPENDIX A UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Argued January 17, 1975)

Decided March 28, 1975)

Docket Nos. 74-1851 and 74-2296

In the Matter of the Petition of  
 UNITED STATES OF AMERICA,  
 Plaintiff-Appellee,  
 \_ v. \_  
 MANUEL FEDERICO MADRID,  
 Defendant-Appellant.

B e f o r e:

BROWN, Chief Judge and

GEWIN AND MORGAN, Circuit Judges

Appeal from the United States District  
 Court for the Western District of Texas.

PER CURIAM:



Madrid's conviction for knowing transportation of aliens was affirmed by this Court, United States v. Madrid, 5 Cir., 1975, 510 F.2d 554, but later remanded for reconsideration in light of intervening Supreme Court cases<sup>1</sup> concerning checkpoint stops and border searches of vehicles, United States v. Madrid, 5 Cir., 1975, 517 F.2d 937. The District Court held an evidentiary hearing and determined that the stop in this case was made at a permanent checkpoint and therefore the stop and search of Madrid's automobile were valid. We affirm.

Recent Fifth Circuit case law has answered the question specifically left open

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1. United States v. Ortiz, 1975, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623; United States v. Brignoni-Ponce, 1975, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607.

by the Supreme Court in Ortiz, 422 U.S. at 897 n. 3, 95 S.Ct. at 2589, 45 L.Ed. 2d at 629. We have held that Border Patrol officers may lawfully stop motorists at established permanent checkpoints for questions as to citizenship without reasonable suspicion or probable cause. United States v. Coffey, 5 Cir., 1975, 520 F.2d 1103, 1104; United States v. Santibanez, 5 Cir., 1975, 517 F.2d 922, 923.

In our original opinion we found that this checkpoint, on Highway 70-82 near the White Sands Missile Range, was, as Madrid then conceded, a permanent checkpoint under United States v. Hart, 5 Cir., 1975, 506 F.2d 887, vacated and remanded, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706.<sup>2</sup> Therefore, the only determination left to the District Court on remand was

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2. 510 F.2d at 556.

whether the recent border cases<sup>3</sup> negated our original finding that this was a permanent checkpoint.

The District Court held an evidentiary hearing and again determined that this was a "permanent fixed checkpoint"<sup>4</sup> and therefore the stop was valid. Since this was a conviction for illegally transporting aliens who were in plain view in the back of the car<sup>5</sup>, we are not faced

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3. See note 1, supra.

4. THE COURT: All right. I'm going to find, based on the mandate of the Fifth Circuit, based on the evidence that I was directed to hear in this case, I find that the checkpoint was fixed and permanent, maintained on a daily basis, eight hour shifts, with actual fixed buildings, turn-off areas and the like, and that it was in fact a permanent fixed checkpoint and that it was indeed a reasonable distance from the border between Mexico and the United States.

Tr. 45.

5. See United States v. Nunn, 5 Cir., 1976, 525 F. 2d 958, 959 n. 2.

with the question of suppression of evidence found via a search after the stop, a problem that has frequently confronted us. See, e.g., United States v. Partner, 5 Cir., 1976, 527 F.2d 1337; United States v. Del Bosque, 5 Cir., 1975, 523 F.2d 1251; United States v. Byrd, 5 Cir., 1975, 520 F.2d 1101, petition for rehearing denied, 1976, 528 F.2d 549.

AFFIRMED.

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5. See United States v. Nunn, 5 Cir., 1976, 525 F.2d 958, 959 n.2.

# APPENDIX B

